STATE OF MICHIGAN
IN THE CIRCUIIT COURT FOR THE COUNTY OF GRAND TRAVERSE

GRAND TRAVERSE MALL LIMITED PARTNERSHIP, an Iowa limited partnership,
Plaintiff,
vs

File No. 93-10807-CK
HON. PHILIP E. RODGERS, JR.

ROBIN SIMPSON, an individual, and RAGS, INC., a Michigan corporation, jointly and severally,
Defendants.

Patrick E. Heintz (P31443)
Attorney for Plaintiff

Craig W. Elhart (P26369)
Attorney for Defendants

DECISION AND ORDER

Plaintiff filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(10). Defendants untimely responded to this Court's Pre-Hearing Order which was entered on July 23, 1993. Plaintiff untimely filed a reply to Defendants' response. This Court has reviewed the motion, the briefs, the Lease Agreement and the court file. The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

The standard of review for a (C)(10) motion is set forth in Ashworth v Jefferson Screw, 176 Mich App 737, 741 (1989).

A motion for summary disposition brought under MCR 2.116 (C)(10), no genuine issue as to any material fact, tests whether there is factual support for the claim. In so ruling, the trial court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence submitted by the parties. MCR 2.116 (G)(5). The opposing party must show that a genuine issue of fact exists. Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether the kind of record that might be developed would leave open an issue upon which reasonable minds could differ. Metropolitan Life Ins Co v Reist, 167 Mich App 122, 118; 421 NW2d 592 (1988). A reviewing court should be liberal in finding that a genuine issue of material

fact exists. A court must be satisfied that it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome. Rizzo v Kretschmer, 389 Mich 363, 371-372; 207 NW2d 316 (1973).

The party opposing an MCR 2.116 (C)(10) motion for summary disposition bears the burden of showing that a genuine issue of material fact exists. Fulton v Pontiac General Hospital, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials of the pleadings but must, by other affidavits or documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116 (G)(4). If the opposing party fails to make such a showing, summary disposition is appropriate. Rizzo, p 372.

Plaintiff seeks to recover damages for breach of a Lease Agreement entered into by Robin Simpson as President of Rag's, Inc. on July 9, 1992. Further, Plaintiff seeks enforcement of guarantor liability against Robin Simpson. In their Answer to the Complaint, Defendants acknowledge the execution of the Lease Agreement and the Guaranty. Defendants further admit that they have breached the contract terms. Defendants set forth the following affirmative defense, "Plaintiff is estopped from claiming any damages under the terms of the Lease Agreement due to its failure or refusal to completely fulfill the projections as it indicated it would."

Plaintiff, on page 2 of its brief in support of the instant motion, states that, "[t]he sole issue raised by the defense to this point is whether or not there were any 'inducements' or other misrepresentations upon which Defendant [sic] could reasonably rely in limiting her liability and that of her corporation in this case." On page 2 of Defendants' brief in opposition to the instant motion, these Defendants set forth their defense, as follows:

Defendant Simpson relied on the representations made by the mall promoters in determining whether changing the location of the store would be a prudent business decision, and decided to change locations because, based on the projected mall traffic, she anticipated sales sufficient to pay the lease expenses. On behalf of Rags, Inc., she entered into a lease for space at the Grand

Traverse Mall on May 22, 1992, which was prepared by the

mall's representatives. Under the terms of the lease, Defendant Rags, Inc. was to pay annual rent of $19,956.00.1 Defendant Simpson also executed a personal guaranty for the obligations under the lease.

The actual amount of foot traffic within the mall fell far short of the projections given to Defendants by the mall promoters. Nevertheless, Defendants Simpson and Rags, Inc. complied with all terms of the lease agreement until January of 1993. By that time, Defendants were financially forced to-close the store, due to the low amount of mall traffic and the low sales during the Christmas season. Defendants lack the funds to operate the store at any other location.

Plaintiff refers to merger language within the Lease Agreement to support the assertion on page 3 of its brief that, "all prior undertakings between the parties were merged in the principal agreement and that no representations expressed orally were otherwise enforceable." Plaintiff highlights the following provisions of the Lease Agreement:

61. ENTIRE AGREEMENT, ETC.: (a) This Lease, including the Exhibits and Riders attached hereto, sets forth the entire agreement between the parties.

(b) All prior conversations or writings between the parties or their representatives are merged herein and extinguished.

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(f) Tenant hereby acknowledges that the Lease shall not be deemed, interpreted or construed to contain, by implication or otherwise, any warranty, representation or agreement on the part of the Landlord that any Department Store or regional or national chain store or any other merchant shall open or remain open for business or occupy or continue to occupy any premises in or adjoining the Shopping center during the Lease Term or any part thereof and Tenant hereby expressly waives all claims with respect thereto and acknowledges that Tenant is not relying on any such warranty, representation or agreement by Landlord either as a matter of inducement in entering

Footnote 1: Defendant Robin Simpson admitted in her responses to Plaintiff's Requests to Admit that Defendant Rags, Inc. was obligated to pay $19,956.00 per annum at the rate of $1,663.00 per month from the lease commencement date through January 31, 1995, pursuant to the terms of the Lease Agreement.

into this Lease or as a condition of this Lease or as a covenant by Landlord.

Plaintiff contends that the merger language within the contract prevents Defendants' from asserting prior statements or representations, whether written or oral, as a defense to their otherwise acknowledged contractual obligation.

Plaintiff asserts, on page 4 of its brief, that the foregoing lease provisions, "are unambiguous on their face, precluding any parol evidence of extemporaneous agreements, whether oral or otherwise which contradict, vary, or modify same." This Court finds merit in Plaintiff's position. The merger language extinguishes Defendants' claims that inducements made prior to the parties entering into the Lease Agreement sanction Defendants' default. NAG Enterprises Inc v Allstate Industries Inc, 407 Mich 407; 285 NW2d 770 (1979); Ditzik v Schaffer Lumber Co, 139 Mich App 81, 87-88; 360 NW2d 876 (1984).

Defendants' arguments that there is ambiguity in the Lease Agreement or that prior representations should be considered must fail. Paragraph 61 (b) and (f) of the lease are not ambiguous. Further, this Court rejects Defendants' assertion that these provisions are "surplusage." The Court has reviewed Burton v Travelers Ins Co, 341 Mich 30, 32; 67 NW2d 54 (1954); and Union Investment Co v Fidelity & Deposit Co of Maryland, 549 F2d 1107 (1977), the cases cited by Defendants which purport to support their "surplusage" argument. Both cases are inapposite to the instant matter.

On July 9, 1992, Defendant Robin Simpson signed an affidavit which reads in pertinent part,

The undersigned has independently investigated the potential for the success of its operations in the Shopping Center and has not relied upon any inducements or representations on the part of the Landlord or Landlord's representatives other than those contained in the Lease.

Defendants seek to explain away the unambiguous lease and affidavit with the following rationale:

To the extent that Defendants were already operating the Benetton store in another Traverse City location and therefore knew that there was an area demand for the products they were marketing, Defendant Simpson had independently investigated the potential for success and did not need to rely on any representations of Plaintiff's agents regarding the feasibility of Defendants' operations, although such representations were also made. However, Defendant had no way of knowing that the traffic conditions at the Grand Traverse Mall, a new establishment, would not be as Plaintiff's agents had represented. Defendant Simpson had no way of knowing that moving a going business from the downtown area to the new mall would result in the loss of the business.

Defendants' argument that projections of greater-than-actualized mall traffic void the terms of the parties' contract cannot be recognized. The Defendants simply disclaim the caveats contained in the Lease Agreement and the affidavit executed by Robin Simpson prior to Defendants' occupancy of their store in the new mall. The Defendants ask this Court to deny Plaintiff's motion and acknowledge parol evidence in the face of an affidavit and a contemporaneous contractual document with merger language to the contrary.

If the Defendants can escape the obligation to pay Plaintiff according to the terms of the contract in this fashion, there can be no effective merger provision in a commercial lease agreement. Without a showing of fraud, duress or mutual mistake, the parties are bound by their written agreement and it cannot be changed by a subsequent self-serving affidavit.2 Certainly, there is no counter-complaint before the Court and fraud must be pled with particularity. MCR 2.112(B).

This Court finds that the following remarks, from the NAG Enterprises per curiam opinion, comprehensively address the admissibility of parol evidence in a dispute such as the ore now

Footnote 2: Here, Defendants would manufacture a factual controversy by filing contradicting affidavits, the first to close the Lease Agreement and the second to avoid its financial obligations when

the business failed. This risk of loss was assumed by Defendants and not Plaintiff. In the face of an unambiguous lease and affidavit, there is no genuine issue of material fact.

before the Court:

[T]he test for applying the parol evidence rule is whether the extrinsic evidence seeks to contradict the terms of the written instrument

This analysis overlooks the prerequisite to the application of the parol evidence rule: there must be a finding that the parties intended the written instrument to be a complete expression of their agreement as to the matters covered. Extrinsic evidence of prior or contemporaneous agreements or negotiations is admissible as it bears on this threshold question of whether the written instrument is such an "integrated" agreement. As we said in Goodwin, Inc v Orson E Coe Pontiac, Inc, supra:

"A number of well-established exceptions to the parol evidence rule have been recognized, however, by Michigan courts. For example, the rule does not preclude admission of extrinsic evidence showing: that the writing was a sham, not intended to create legal relations, Tepsich v Howe Construction Co, 377 Mich 18, 23-25; 138 NW2d 376 (1965); that the contract has no efficacy or effect because of fraud, illegality, or mistake, Rood v Midwest Matrix Mart Inc, 350 Mich 559, 564-567; 87 NW2d 186 (1957); Schupp V Davey Tree Expert Co, 235 Mich 268, 271; 209 NW2d 85 (1926); that the parties did not 'integrate' their agreement, or assent to it as the final embodiment of their understanding, Mardon v Ferris, 328 Mich 398, 400; 43 NW2d 904 (1950); Wagner v Egleston, 49 Mich 218; 13 NW 522 (1882); or that the agreement was only 'partially integrated' because essential elements were not reduced to writing, Brady v Central Excavators, Inc, 316 Mich 594; 25 NW2d 630 (1947)." 392 Mich 204.

NAG Enterprises, supra at pp 410-411.

This Court finds that "the parties intended the written instrument to be a complete expression of their agreement as to the matters covered." Id., p 410. This Court finds neither ambiguity "nor a factual dispute in its review of the subject contract or the Robin Simpson affidavit of July 9, 1992. The Lease Agreement is devoid of any reference to the sales projections or revenues which Defendants allege, and the statements made by Defendant Robin Simpson in her affidavit of August 5, 1993, only seek to contradict the terms of the written contract. This is not a proper foundation for the admission of parol evidence. NAG Enterprises, supra.

Since Defendants have not shown the existence of a genuine issue of material fact, they are liable to pay Plaintiff according to the terms of the Lease Agreement. For the reasons set forth above, this Court grants Plaintiff's motion for summary disposition. MCR 2 . 116 (C) (10) .

Plaintiff also correctly asserts that damages continue to accrue until the subject premises are re-let to another tenant. Plaintiff shall prepare a proposed Judgment consistent with this decision and order, which judgment also provides for a reduction in damages upon filing a subsequent affidavit indicating that Plaintiff has mitigated its loss by re-letting the subject space and describing the term of the lease and associated rental amount.

IT IS SO ORDERED.

HON. PHILIP E. RODGERS, JR.
Circuit Court Judge
Dated: 10/14/93